

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

27435

FILE:

B-212719

DATE:

February 14, 1984

MATTER OF:

The National Bank of Fort Sam Houston

DIGEST:

1. On conflict of interest questions concerning employees and ex-employees of contracting agencies, GAO's bid protest review function is to determine whether the employee involved may have exerted prejudice for, or bias on behalf of, the company which was awarded the contract without regard to whether the employee may have also engaged in conduct constituting a conflict of interest. Based on an analysis of the evidence of record, award may not be questioned under this review standard.
2. Protester has not met its burden of affirmatively proving its case where the protester and the agency submit conflicting statements as to whether the awardee's initial proposal was timely.
3. The record indicates that the procuring agency: (1) properly evaluated the protester's technical proposal in accordance with the evaluation criteria set forth in the request for proposals; (2) discussed a particular contract line item proposal with the protester; (3) eliminated the protester on another contract line item at issue due to cost considerations; and (4) properly evaluated the awardee's technical support capabilities.
4. The Department of the Treasury had an interest in the subject matter of the solicitation and may have recommended the protester for award. Nevertheless, the procuring agency was not required to follow this recommendation since we are not aware of any requirement that the Army permit the Treasury to evaluate proposals.

5. Where the protester does not allege that there was inadequate competition and unreasonable prices, an allegation that the award created a virtual monopoly in the awardee provides no basis for questioning the propriety of the award. To the extent that protester alleges antitrust violations, these are matters for the Attorney General, and GAO will not consider them under its bid protest functions.
6. Protest against an alleged impropriety in the RFP is untimely when it is not filed until after the closing date for the receipt of initial proposals. Each individual basis of protest must independently satisfy the timeliness standards established in GAO's Bid Protest Procedures.
7. The protester alleges that the awardee is improperly engaging in self-insurance, but the protester has not shown that the awardee did not comply with Defense Acquisition Regulation § 10-303(b) (Defense Acquisition Circular No. 76-42, February 28, 1983) concerning self-insurance.

The National Bank of Fort Sam Houston (Bank) protests the award of a contract to American Express International Banking Corporation (AEIBC) under request for proposals (RFP) No. MDA903-84-R-0001, issued by the Defense Supply Service, Department of the Army, for the operation of military banking facilities in several countries for the Department of Defense. Although the Army issued the RFP, the Defense Contract Audit Agency (DCAA) was responsible for evaluating proposals.

The protest is denied in part and dismissed in part.

The Bank essentially claims that the Army improperly awarded several contract line items to AEIBC due to a number of irregularities and that the Army instead should have awarded these particular contract line items to the Bank. Specifically, the Bank contends that: (1) AEIBC did not timely submit its initial proposal; (2) a conflict of interest resulted from a DCAA employee accepting employment

with AEIBC prior to the due date for submission of initial proposals, and a potential conflict of interest arose when a Department of Defense employee applied to AEIBC for employment before the due date for the submission of initial proposals; (3) the Army did not apply the RFP's evaluation criteria in making the award and, in any event, the Bank should have been invited to negotiate the alleged pricing defects in its proposal for service in the Philippines; (4) neither the Bank's data transmission capabilities nor AEIBC's lack of such capabilities was properly evaluated; (5) the Department of the Treasury should have been consulted prior to award; (6) competition was restricted because the award resulted in a monopoly for AEIBC, and important information was withheld by the government; and (7) AEIBC apparently proposed self-insurance which has not been considered satisfactory in the past.

Timeliness of AEIBC's Initial Proposal

The Bank claims that it has strong reason to believe that AEIBC did not timely submit its initial proposal. In contrast, the contracting officer reports that AEIBC did timely submit its initial proposal.

A bid protester has the burden of affirmatively proving its case, and we will not consider the burden met when the only evidence is conflicting statements by the protester and the agency. Alchemy, Inc., B-207954, January 10, 1983, 83-1 CPD 18. In view of the conflicting statements by the Bank and the Army, we thus conclude that the Bank has failed to prove that AEIBC did not timely submit its initial proposal, and we deny the protest on this issue.

Conflicts of Interest

The Bank contends that a conflict of interest resulted when a "Senior European DCAA banking auditor" accepted employment with AEIBC approximately 1 month prior to the due date for submission of initial proposals. The Bank claims this auditor had knowledge of the Bank's operating systems and access to the Bank's financial data while working at DCAA. The Bank also contends that a potential conflict of interest arose when an employee of the Office of the Assistant Secretary of Defense (Comptroller) applied to AEIBC for employment before the due date for submission of

initial proposals since the contracting officer's technical representative (COTR) was under this employee's supervision.

Our interest, within the confines of a protest, is to determine whether government employees may have exerted prejudice for a bidder or offeror--without regard to whether the employees may have also engaged in conduct constituting conflicts of interest. See J. L. Associates, Inc., B-201331.2, February 1, 1982, 82-1 CPD 99.

The protester, having the burden of proof, has offered no evidence to bolster its conjecture that AEIBC may have obtained an improper advantage under this procurement through the employee of the Office of the Assistant Secretary of Defense. Moreover, the protester does not allege that the senior DCAA auditor improperly aided AEIBC for this procurement before he left DCAA. Further, implicit in the Army's position that no conflict of interest resulted in these circumstances is the denial that either employee exerted prejudice in favor of AEIBC. Therefore, we deny this basis of protest.

Criteria for Selection

The Bank contends that it was informed by the COTR that the selection of AEIBC for service in the Philippines was primarily based on cost, the third evaluation factor, and that the selection for this item was thus improper because the RFP listed the evaluation factors in descending order of importance. The Bank claims that the COTR stated that the Bank's prices were too high on two line items and unrealistically low on another line item. The Bank also alleges that it should have been invited to negotiate its line item proposal for the Philippines.

The contracting officer claims that all proposals were reviewed in accordance with the evaluation criteria set forth in the RFP. He reports that technical and performance elements were first evaluated and that cost was only considered after a proposal was determined to be technically acceptable. The contracting officer further states that the Bank was "given an indication of our concerns when the proposal for the Philippines was discussed." And the contracting officer indicates that the Bank's final proposal did not show improvement; therefore, it was not considered to be in the "zone of consideration."

It is the contracting agency's function to determine the relative merits of proposals, and the agency has considerable discretion in making that determination. We therefore will not question an agency's technical evaluation unless the protester shows the agency's judgment lacked a reasonable basis. Science Information Services, Inc., B-207149.2, November 29, 1982, 82-2 CPD 477. Where conflicting statements of the protester and the contracting agency constitute the only available evidence, the protester has not met its burden. Crown Point Coachworks and R&D Composite Structures; North American Racing Company, B-208694; B-208694.2, September 29, 1983, 83-2 CPD 386.

While the Bank contends that cost considerations were improperly evaluated, the Army alleges that it considered the technical and performance elements of the Bank's proposal in determining the Bank's proposal to be technically acceptable and only then did not award to the Bank due to cost considerations. In our view, the record indicates that the Army did evaluate the Bank's proposal in accordance with the evaluation criteria set forth in the RFP. The record also indicates that the Army did discuss the Bank's proposal for the Philippines with the Bank. The Bank therefore has failed to show that the Army improperly evaluated its proposal as alleged by the Bank, and we find this issue of protest without merit.

Evaluation of Data Transmission Capabilities

The Bank alleges that the Army improperly discounted the Bank's data transmission capabilities under the Bank's line item proposal for the United Kingdom-Iceland in evaluating the Bank's proposal. The Bank also argues that the Army did not consider AEIBC's alleged inability to achieve communication between "German Military Banking Facilities" and the awardee's central Frankfurt office. The Bank contends that the Army thus apparently accepted AEIBC's cost proposals without verification of AEIBC's technical proposals.

The Army contends that the Bank's line item proposal for the United Kingdom-Iceland was determined to be technically acceptable and that the Bank's inability to produce a cost competitive proposal was the basis of the decision not to award this line item to the Bank. As to the

cost considerations involved, the Army reports that there were "deep concerns . . . over the accuracy of the entire Bank proposal." Specifically, the Army states that "selected items of [the Bank's proposal] show unwarranted optimism and some expense items . . . are very optimistic." Finally, the Army notes that the Bank's proposal was "priced too high."

The Army thus argues that the Bank's claim of data transmission competence, even if true, would not alter the reasons for award of this line item to AEIBC. The Army also claims that the technical evaluation team determined that AEIBC could provide technical support for German Military Banking Facilities.

Based on our review of the record, we conclude that the Army rejected the Bank's proposal, after determining that the Bank's proposal was technically acceptable, because of cost considerations. Thus, we cannot agree with the Bank that the Army improperly discounted the Bank's data transmission capabilities in evaluating its proposal.

With regard to AEIBC's alleged inability to achieve communication, the record indicates that the Army properly determined that AEIBC could provide technical support for German Military Banking Facilities.

Accordingly, we deny the protest on this issue.

Treasury Input

The Bank argues that the Department of the Treasury should have been consulted on the awards, considering that the Treasury has one or more "General Accounts" in each line item.

The Army claims that there was no requirement that the Treasury participate in the solicitation and award process. The contracting officer contends that the evaluation team conducted an adequate evaluation without consulting the Treasury.

Although the Treasury has an interest in the subject matter of the solicitation and may have recommended the Bank for award, the Army was not required to follow this recommendation, since we are not aware of any requirement that the Army permit the Treasury to assist in the evaluation of proposals.

Restriction of Competition

The Bank argues that the awards have created a virtual monopoly for AEIBC. The Bank also contends that the government, by no longer providing income or expense information in the solicitation as it did in the past, is giving the incumbent an edge and thus restricting competition.

Concerning the Bank's claim of monopoly, insofar as the Bank is contending there is a potential antitrust violation, we do not consider under our bid protest function allegations regarding antitrust violations; these are matters for the Department of Justice. Monarch Enterprises, Inc., B-208631, May 23, 1983, 83-1 CPD 548. Further, the propriety of an award is determined on the basis of whether adequate competition and reasonable prices are obtained. The Bank does not allege that adequate competition and reasonable prices were not obtained, and we thus cannot conclude that the fact of award to AEIBC was improper.

As to the exclusion of income and expense information from the RFP, section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 21 (1983), provides that a protest based upon an alleged impropriety in an RFP that is apparent prior to the closing date for receipt of initial proposals must be filed before that date. Further, where a protest incorporates multiple bases, we have held that each individual basis of protest must independently satisfy the timeliness standards established in our procedures. Tracor Jitco, Inc., B-208476, January 31, 1983, 83-1 CPD 98. Therefore, since the alleged impropriety here was apparent prior to the closing date for receipt of initial proposals, and this protest was months after the closing date, we dismiss this issue as untimely filed.

AEIBC's Insurance

Finally, the Bank argues that AEIBC, by seeking insurance for its accounts from Fireman's Fund (which, along with AEIBC, is a subsidiary of American Express Corporation), is apparently engaging in a form of self-insurance. The Bank claims that self-insurance in the past has not been considered satisfactory for purposes of coverage of accounts.

The Army contends that, even assuming that AEIBC is insuring itself, AEIBC has met the qualifications for self-insurance under Defense Acquisition Regulation (DAR) § 10-303(b) (Defense Acquisition Circular No. 76-42, February 28, 1983). DAR § 10-303(b) provides, in pertinent part:

"Programs of self-insurance covering a contractor's insurable risks may be approved when examinations of such programs indicate that their application is in the best interest of the government. . . . To qualify for a program of self-insurance, a contractor must demonstrate that it can sustain the potential losses being self-insured. . . ."

The Army claims that Fireman's Fund's annual report reveals financial information demonstrating that AEIBC would be able to sustain its potential losses through coverage by Fireman's Fund. The Army also alleges that AEIBC submitted further details of this insurance plan which evidence that coverage by Fireman's Fund would be in the "best interests of the government."

The Bank's bare assertion that AEIBC is apparently improperly engaging in self-insurance does not show that AEIBC, by seeking coverage through Fireman's Fund, did not comply with DAR § 10-303(b), above. Accordingly, we find this issue of protest without merit.

The protest is denied in part and dismissed in part.

Milton J. Fowler
for
Comptroller General
of the United States